IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUMBIA CANNING COMPANY (a corporation) and **R. A. LEONARD**, *Appellants*, vs. **W. H. HAMPTON** and **J. P. NELSON**, *Appellees.*	No. 1422

BRIEF OF APPELLEE

W. H. HAMPTON

JNO. R. WINN,
NEWARK L. BURTON.

Lowman & Hanford Stationery and Printing Co., Seattle, Wash.

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Brief of Appellee, W. H. Hampton

STATEMENT OF THE CASE.

We are not satisfied with the statement of the case as given by appellants, and therefore will proceed from our viewpoint and from the findings of fact as rendered by the trial court and what we claim to be the undisputed facts in the case, so far as the Appellate Court is concerned, to make a full and more detailed statement, viz.:

Some time in the fall of 1904, the defendant Leonard, on the part of the defendants (appellants in this court), went upon the beach of Lynn Canal, a navigable arm of the North Pacific Ocean, at a point on St. Mary's Penin-

sula, District of Alaska, immediately in front of and abutting upon a piece or parcel of land which is herein described by metes and bounds, and posted a notice of location of a fish trap; and in addition to such posting caused to be set near the line of low tide three stakes or small piles, which were at the time cut from the timber above the beach. These three pieces of timber were not driven and were set so insecurely that they did not long withstand the action of the tide. Neither this notice nor any other notice of location of the fish trap was ever recorded at any place, and in fact no notice of any kind or nature was ever recorded at all. After setting the three timbers or stakes, the defendants left the place without doing more. The next persons to visit the spot were the representatives of the plaintiff (appellee in this court), which was in the early spring, about the opening of the fishing season of 1905, and at the time of the arrival of the representatives of the plaintiff nothing remained of defendant's piles, timbers or notice to advise the plaintiff or his representatives that any prior location of a fish trap site had been made; nor did the plaintiff or his representatives have any notice or knowledge of any claim ever having been made to said location by the defendants, or either of them.

That the plaintiff shortly after going to the location in question in the spring of 1905, sent one Keating, who was a surveyor and representative of plaintiff, and immediately had the upland abutting upon the fish trap location in question surveyed and the boundaries marked and described as set forth in the first finding of fact of the Court (Rec., p. 99); and plaintiff made out and posted upon the ground described in the survey a location notice, claiming said location as a fish trap site, and had a copy of the notice filed and recorded in the proper recording district. That about the time that Keating, who represented the

plaintiff as aforesaid, surveyed off the ground and was running lines along the shore, a crew with a pile driver and a raft of piles for the plaintiff appeared upon the tide lands and waters in front of the said piece of surveyed ground, and soon thereafter the plaintiff commenced driving piles in and upon the tide lands and waters in front of said surveyed ground for a fish trap. That after plaintiff had driven eight piles in a line out from the shore of said waters and over the tide lands abutting upon the surveyed piece of ground, and had also driven a "dolphin" consisting of three piles out in deep water, and after he had driven all the piles he had in his raft—a watchman was left on the ground surveyed and the beach in order to hold possession of the premises and fish trap location, and the remainder of the men of the crew of the plaintiff left with a steamer for the purpose of getting more piles to finish the said fish trap.

That a short time after the crew of the plaintiff left, the defendant Leonard appeared upon the said tide lands and water in front of the piece of land described and surveyed by plaintiff, and at the spot where plaintiff was driving his fish trap, and the defendant Leonard at the time had with him a pile driver, a crew therefor, and a tow of piles. That defendant Leonard was notified at this time by the watchman so left upon the beach and surveyed ground by plaintiff, that the tide lands and place in dispute, and upon which plaintiff was constructing his fish trap, belonged to the plaintiff, and that the piles which had been driven by the plaintiff were for the construction of a fish trap, and that the trap in course of construction was being constructed upon the plaintiff's fish trap location. The defendants paid no attention to the warning or notice and went to work with their pile driver and crew and drove the piles which they had on hand, in the con-

struction of a fish trap, and the driving of the piles by the defendant was done in such a manner that one of the plaintiff's piles so driven by said plaintiff was made a part of defendants' trap, and defendants continued in the work of the construction of the fish trap; that same was so constructed and put in as to render plaintiff's work useless and of no value whatever.

The defendants completed their fish trap shortly after the commencement of the driving of the same, and ever since that time have occupied the location in question and have run, operated and maintained the fish trap upon the same.

That all of this was against the consent of the plaintiff; and soon after the defendants showed their inclination to take entire possession of the location in question, and before the trap was completed this action was commenced and notice of application for a restraining order served upon the defendants.

That the location in question is a valuable one for fishing purposes and abounds in that species of fish known as salmon; and the eight piles which had been driven by the plaintiff were intended as a lead for the fishing device known as a "fish trap," upon which said "lead" web was intended to be hung in order to lead or cause the fish running in said waters to go into a heart or spiller, and thereby become entrapped; and after said salmon were so entrapped, to raise the web and remove the fish therefrom and the fish put to use for canning and other purposes.

We give the foregoing as a correct statement of the case, and in order to verify the same refer the Court to the findings of fact of the trial court, found in the Transcript of the Record, on pages 99 to 103, both inclusive.

Upon these facts, as shown by the evidence and found by the trial court, a permanent restraining order was

granted as set forth in the record herein, restraining the defendants from interfering with the property and rights of the plaintiff in and to the fish trap location in controversy, and it is from this order, judgment and decree, that defendants have appealed and desire this Court to reverse or set aside.

ARGUMENT.

From the foregoing statement of facts and findings of the lower court, and we may say the conceded facts in the case, we claim that the plaintiff (appellant in this court) was, at the time his rights were invaded, in the actual occupation and possession of the upland abutting upon the fish trap location, and had the same littoral rights as are incident to ownership in fee, and among these is the right of access over and across abutting tide lands to deep water of Lynn Canal; and by reason of this possession and occupation of the upland would have the paramount right to wharf or build out and construct to deep water either a wharf or a device known as a fish trap; or would have the right to continue the construction of a fish trap, after having commenced the same, into deep water, so long as the right of navigation was not impaired.

We deem it a settled proposition of law that the owner of land fronting or abutting upon a navigable arm of the sea has the right of access from his land to deep water, and may recover compensation for the cutting off of that access, or maintain an injunction against parties who seek to destroy his access to deep water; and, hence, we claim that aside from any other question in the case, except the occupation and possession of the upland by the plaintiff, that plaintiff would have the right to maintain this action and to restrain defendants from constructing a fish trap in

front of his upland. We believe this doctrine is upheld by the following cases:

Shively vs. Bowlby, 152 U. S. 1; 14 Sup. Ct. 548.
Yates vs. Milwaukee, 10 Wall. 497.

Certainly this rule has been adopted by the courts of Alaska. See

Lewis vs. Johnson, 76 Fed. 477.
Carroll vs. Price, 81 Fed. 137.
Sutter vs. Heckman, 1 Alaska Rep., 81-88, inc.

The last mentioned case was appealed from the District Court of Alaska to this Honorable Court, and is reported in 119 Fed., p. 83, and 128 Fed., 363; and the Court, as we understand, held, that under the provisions of Sec. 8, Act May 17, 1884, providing for a Civil Government for Alaska, etc., "Indians or other persons in said district shall not be disturbed in possession of any lands actually in their use or occupation, or now claimed by them," etc. * * * "Persons who, with their grantors, have since prior to said act occupied and used said lands adjacent to the coast, including a small strip of tide lands which they had cleared from stones and stumps to fit it for use in drawing seines for catching salmon, are entitled to be protected in the undisturbed use of such tide lands as against others who assert a common right to fish thereon."

While Congress saw fit to recognize possessory rights of Indians and other persons at the time of the passage of the act of 1884, we do not see why the courts should not protect possessory rights to either tide lands or uplands which have been initiated since the passage of said act. Certainly this rule of law has been adhered to in Alaska, and any possessory rights, either to uplands or tide lands,

which have been initiated since the passage of the statute above referred to have been protected by the courts.

Lewis vs. Johnson, supra.
Carroll vs. Price, supra.
Sutter vs. Heckman, supra.

And, as above stated, we claim in this case that at the time the defendants commenced the construction of their fish trap, that the plaintiff herein was in the actual occupancy and possession of the tide lands over, in and upon which the said defendants commenced the construction of their trap, and the plaintiff had such a possession of the tide land as we think the courts will protect.

II.

We will now proceed to consider the case at bar in the light that it was considered by the trial court, leaving out the question of the ownership of the upland, and it seems to be conceded by defendant, that the law as laid down in 2nd Farnham on Waters and Water Ways, Sec. 394, pertaining to the enjoyment of fishery rights in public waters, is as therein stated, which is as follows:

"Even in the absence of statutory regulations as to the matter of enjoying fishery rights, the character of the right is such that everyone has an equal right to it, and no one has an exclusive right. Therefore, the right to use a fishery at the proper time depends upon priority of possession and lasts only so long as the possession is maintained. The fishery must be used for the purpose for which it was designed and so as to further the welfare of the one seeking to enjoy the right without injuring other persons having equal rights." * * * "The public has a right to fish in public waters even in front of riparian property, if such property is not molested." * * * "Every individual has the right to enjoy the public right, and since no two individuals can enjoy precisely the same

right at the same time, some rule must be observed as to the order of time in which the right shall be exercised. In some instances this is regulated by custom. No person can acquire a right of fishing in a public fishery superior to any other, unless he has gone into the common waters and set up and established his pounds and stakes, and taken possession of the line which those pounds and stakes include, with which a stranger cannot directly interfere." * * * "When labor is necessary to fit a certain place for profitable fishing, the one bestowing that labor is entitled to protection in its enjoyment as long as he continues in possession and occupation."

Counsel for defendant seems to contend, however, that the plaintiff was never in possession of the fishery or fish trap location, claiming that the driving of eight piles in a row upon which it was intended that web should be hung to constitute a lead for the trap, the driving of a "dolphin," the placing of a man in possession of the premises while the plaintiff had sent for other piles to complete the trap—do not constitute possession. The law does not deal in such absurdities which counsel for defendant contend for, nor do we think that the courts are so technical in construing what possession consists of as to conclude that under the evidence in the case at bar and the findings of the Court—that the plaintiff was not in possession of the fish trap location at the time defendants commenced the construction of their trap and the driving of piles. If, as Mr. Farnham says, "the right to use a fishery at the proper time depends upon priority of possession," surely this possessory right must at some time be initiated, and when once so initiated and the party uses ordinary diligence in the completion of his fish trap or device for the catching of fish, and exercises good faith—he will surely be allowed a reasonable time to complete his pounds, fish trap or other device, the construction of which has been commenced.

The trial court in the case at bar made the following finding in this connection:

"The court further finds from the evidence that the plaintiff herein exhibited diligence and good faith in the building and construction of his fish trap, and that had it not been for the wrongful acts of the defendants herein he would have completed his trap within a reasonable time."

Should the Court follow the reasoning of counsel for defendants it would lead to this conclusion: That no matter how many thousands of dollars a person may expend in the construction of a fish trap, until the last thread of web is hung upon it such person has acquired no superior right to the location over the general public, and he could at any time, until the absolute completion of the trap, be deprived of the fruits of his labor and his location for such trap be taken possession of by others without his having any redress whatever. We do not think that such is the law, for, if so, the property rights in and to such property would be so uncertain that no one would engage in the fishing business.

In the case of *Lincoln vs. Davis*, 19 N. W. Rep. 112, the Court states:

"On the large open waters there is no reason except public convenience which could make it improper to fish with the aid of any machinery or apparatus suitable to the business; and if stakes or similar devices are used and the public authorities do not see fit to intervene, no one else can do so who is not hindered in the exercise of those rights of navigation which are open to everybody."

Also, Mr. Farnham, in speaking of this doctrine of one person interfering with the rights of another to fish in public waters, Sec. 395, states as follows:

"As long ago as the reign of Edward III. in England there is a writ on behalf of the abbot of Buckfast against Robert, Dean of the Church of the Blessed Peter, for erecting a weir which prevented fish from coming to the abbot's weir."

Which doctrine we think has been followed down to the present day where the right of common law prevails and the privileges and rights of persons to fish in public waters are not regulated by statutes.

In the case of the *Pacific Steam Whaling Co. vs. Alaska Packers' Association*, 72 Pac. 162, the fishing was by a gill net out in deep water, where no question of upland ownership was involved—simply on the open seas—and the Alaska Packers' Association prevented the Steam Whaling Company, when once having its net and seines established, to draw them in and fish the waters. In other words, prevented the Whaling Company after once being possessed of the location in deep water, by reason of establishing its nets, to fish the waters thus occupied; and the Court held that an action could be maintained by the Steam Whaling Company against the Alaska Packers' Association for thus invading the rights of said Whaling Company.

How much more so, should the rights of the plaintiff in this case be protected, when his fishing device is not a movable net or web, but a fixed structure that the defendant cannot interfere with without completely destroying the property or property rights of the plaintiff.

It is held in Connecticut that one who clears and occupies a fishing place in the bed of a navigable river acquires an exclusive right to fish there so long as he continues his occupancy in the fishing season.

Pitkin v. Olmstead, 1 Root (Conn.) 217.
Munson vs. Baldwin, 7 Conn. 168.

The authorities which counsel for defendants cites (15 Mass. 488; 29 Am. Dec. 561) in support of the doctrine that "exclusive right is not acquired by *clearing out a fishing place*," has no application to the case at bar, for the reason that plaintiff had taken *possession* of the fish trap location and was *occupying* it and pushing the work to completion for the purpose of installing a fish trap at the time the defendants interfered with plaintiff's occupancy and possession.

There must be a commencement in the work of making a fish trap, and time of more or less duration is consumed before the trap is completed. To support the contention of defendants in the case at bar would be to hold that while a fish trap is in the course of construction anyone may come along and take possession of the same. To uphold such a doctrine would prevent the acquisition of property rights in fish traps, or compel a use of force *vi et armis* while the initiatory steps were being taken and until such time as the fish trap was completed.

III.

The third and last ground which counsel argues for a reversal of the decision in the lower court, is that plaintiff is not entitled to injunctional relief. In this connection we desire to say that if the plaintiff has any property rights in and to the fishing trap location in question it is conceded that the defendants have entirely destroyed that right by the construction of their fish trap, and that defendants are guilty of a continuing trespass so long as they occupy the trap location in question, and each and every year that they occupy the same the plaintiff would be entitled to recover damages therefor if he had to resort to an action of damages, and it is a well settled principle that in order to prevent a continuing trespass or a multi-

plicity of suits or where the wrong complained of entirely destroys the property in litigation, that resort may be had to the equity side of the court and a permanent injunction granted.

At page 585 of the 13th Vol. Am. & Eng. Ency. of Law, second edition, we find the following in the text, under subdivision "b," to-wit:

"Certain injuries to fishing rights which, if permitted, would be irreparable, or for which the law furnishes no adequate remedy, may be restrained by injunction. Thus fishing in another's private fishery without right, or otherwise directly interfering with the right of fishing of another person." * * *

Reference is then made to footnote 8 of the same book, in which the following authorities are cited, viz.:

Smith vs. Andrews (1881), 2nd Ch. 678.
Heckman vs. Swett, 107 Cal. 276.
Britton vs. Hill, 27 N. J. Eq. 389.
Walker vs. Stone, 17 Wash. 578.
Lewis vs. Johnson, 76 Fed. 476.

We submit that the plaintiff has no plain, speedy and adequate remedy at law. We refrain from discussing the testimony or evidence in the case for the reason that the facts are virtually admitted and the appeal is not prosecuted from the entire record of the case, but only from such portions as show the status of the parties as to the possession and occupancy of the fishing trap location, and no objection is urged to the judgment of the lower court on the ground that it is not sustained by the evidence, or that the findings of fact and conclusions of law are not sustained by the testimony and evidence. This being the case, we do not surmise that the Appellate Court will in-

quire into the findings of fact and conclusions of law of the lower court, but will only consider their legal effect.

We feel that the findings of fact and conclusions of law, judgment and decree of the lower court should be affirmed.

Respectfully submitted,

JNO. R. WINN,
NEWARK L. BURTON.